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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BUBBA HOKE, BARRY GRESHAM, and
WALKER COUNTY, TEXAS,
Petitioners,
v.
JED BLUDWORTH and JONELL BURNETT,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

J. PRESTON WROTENBERY*
WILLIAM S. HELFAND
MARLA A. MOORE
HIRSCH, ROBINSON, SHEINESS
& GLOVER, P.C.
3600 One Houston Center
1221 McKinney
Houston, Texas 77010
Telephone: (713) 609-7981
Facsimile: (713) 609-7600

* *Counsel of Record*

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QUESTION PRESENTED

Whether the entry of a default judgment, solely on the basis of a minor procedural mistake made by a litigant's attorney, amounts to a denial of the litigant's right to procedural due process, in direct contradiction to the usual course of judicial proceeding and precedent, particularly where punitive damages have been awarded?

LIST OF PARTIES

1. Bubba Hoke, Petitioner
2. Barry Gresham, Petitioner
3. Walker County, Texas, Petitioner
4. Jed Bludworth, Respondent
5. Jonell Burnett, Respondent

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REFERENCE TO OPINIONS

1. The November 21, 1995, decision of the Court of Appeals for the Fifth Circuit, affirming the default judgment of the District Court, is unreported and appears at Appendix A.

2. The July 13, 1994, Interlocutory Judgment Nil Dicit of the United States District Court for the Southern District of Texas appears at Appendix B.

3. The July 13, 1994, opinion of the District Court on the Judgment Nil Dicit appears at Appendix C.

4. The August 9, 1994, order of the District Court, denying Defendants' motion to set aside the Judgment Nil Dicit, appears at Appendix D.

5. The September 21, 1994, Instructions and Special Interrogatories of the District Court appear at Appendix E.

6. The March 14, 1995, Amended Final Judgment of the District Court appears at Appendix F.

7. The March 14, 1995, order of the District Court regarding attorneys' fees appears at Appendix G.

8. The December 20, 1995, order of the Court of Appeals for the Fifth Circuit, denying Defendants' petition for rehearing, appears at Appendix H.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered November 21, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case is based upon the district court's entry of a judgment nil dicit, following the court's decision to strike the Defendants' answer as untimely. Judgment nil dicit was originally a common law doctrine that was later incorporated into Federal Rule of Civil Procedure 55(a), which allows for the entry of default judgment:

> **Rule 55. Default**
>
> **(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and the fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Petitioners contend that an entry of default, made solely on the basis of a minor procedural mistake by a litigant's attorney and ultimately resulting in an award of punitive damages, deprives that litigant of his right to due process as established by the Fifth Amendment to the United States Constitution:

> No person shall be...deprived of life, liberty, or property, without due process of the law....

U.S. CONST. amend v.

STATEMENT OF THE CASE

A. JURISDICTION OF THE DISTRICT COURT.

The United States District Court for the Southern District of Texas exercised jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343.

B. FACTUAL AND PROCEDURAL HISTORY.

On February 10, 1993, Jed Bludworth and his mother, Jonell Burnett, filed a complaint against Donald Hoke, Barry Gresham, and Walker County, Texas, under 42 U.S.C. § 1983, alleging that these Defendants had violated their Fourth and Fourteenth Amendment rights to privacy and unreasonable search and seizure.

In their complaint, Plaintiffs alleged that in the early morning hours of August 26, 1992, Burnett telephoned the Huntsville Memorial Hospital to report that her son was ill. Plaintiffs claimed that approximately fifteen minutes after that conversation, Walker County Sheriff's Deputies Hoke and Gresham arrived at Plaintiffs' residence and informed Burnett that they had received a call from Huntsville Memorial Hospital regarding a disturbance. Plaintiffs alleged that, despite Burnett's request that the officers leave, Hoke entered the residence, hand-cuffed Bludworth, slammed him into the kitchen counter, and dragged him into the living room. The complaint further alleged that the deputies held him on the couch and hit him several times in the stomach. Plaintiffs claimed that Hoke and Gresham then dragged Bludworth to the patrol car and transported him to the Walker County jail, where he was allegedly denied medical attention and verbally abused and taunted by Walker County Sheriff's Department employees.

On March 22, 1993, Defendants filed a 12(b)(6) motion to dismiss, expressly setting forth the Plaintiffs' failure to properly plead a § 1983 claim and raising the issue of the deputies' qualified immunity. The trial court denied the motion to dismiss, and Defendants then filed a motion for summary judgment, asserting several defenses on the Defendants' behalf and again placing the merits of the case in issue. The trial court never ruled on the motion for summary judgment, and over the course of the following year, the parties engaged in substantial discovery.

Although the initial trial setting was May 24, 1994, Defendants' counsel did not realize until the weekend of May 16, 1994, that the Defendants' original answer, although prepared months earlier, had accidentally never been filed. Upon realizing the mistake, Defendants' counsel immediately prepared and filed, on May 17, 1994, the Defendants' original answer. The following day, Defendants' counsel filed Defendants' portion of the pre-trial order, which detailed their factual and legal contentions and, for the third time, placed the merits of the case in issue.

Less than a week before trial, on May 18, 1994, Plaintiffs filed a motion to strike the Defendants' original answer. The trial court continued the original trial setting, and on July 12, 1994, struck Defendants' original answer by virtue of an "Interlocutory Judgment Nil Dicit," effectively rendering a default judgment against Defendants. Defendants filed a motion to set aside the judgment nil dicit, a motion for leave to amend their answer, and a motion to amend the order to allow for interlocutory appeal, all of which were denied.

As a result of the default judgment, all facts alleged in Plaintiffs' complaint against Deputies Hoke and Gresham, as well as Walker County, were deemed true. A trial was

held, on the issue of damages only, resulting in a judgment against Defendants totaling $157,920.00, including attorney's fees and costs. Significantly, $100,000.00 of the judgment that was entered against Deputies Hoke and Gresham were punitive damages.

Defendants appealed the judgment nil dicit to the United States Court of Appeals for the Fifth Circuit, which issued an unpublished opinion affirming the trial court's judgment. Defendants then filed a petition for rehearing, which was also denied.

Despite the trial and appellate courts' refusal to hear their case, Defendants maintain that the entry of a default judgment, solely on the basis of a minor procedural mistake committed by their counsel, is not only unjust and contrary to the usual course of judicial proceeding and precedent, but it is also unconstitutional. Specifically, Defendants maintain that they have been denied their right to procedural due process, particularly since they were unable to defend themselves from those quasi-criminal allegations which ultimately provided the basis for an award of punitive damages. For this reason, Defendants now seek a writ of certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE ENTRY OF A DEFAULT JUDGMENT, SOLELY ON THE BASIS OF A MINOR PROCEDURAL MISTAKE MADE BY A LITIGANT'S ATTORNEY, AMOUNTS TO A DENIAL OF THE LITIGANT'S RIGHT TO PROCEDURAL DUE PROCESS, PARTICULARLY WHERE PUNITIVE DAMAGES HAVE BEEN AWARDED.

A. SUMMARY.

In their complaint, Plaintiffs accused Defendants of egregious conduct, and for the next year and a half, Defendants engaged in extensive discovery and filed several pleadings and dispositive motions, including a pre-trial order, in an attempt to refute Plaintiffs' claims. However, less than a week before trial, the district court decided to continue the case and ultimately entered a default judgment against Defendants, solely because their counsel had, by oversight, failed to file an answer on their behalf and despite the fact that Defendants had continuously and vigorously defended themselves throughout the duration of the lawsuit.

Because of the entry of default judgment, Defendants were precluded from presenting their case to an impartial jury during a trial on the merits of the case. Instead, all allegations made in the Plaintiffs' complaint were deemed true by the district court, and Defendants were forced to participate in a trial on damages alone, unable to defend themselves against the egregious claims made against them. Through no fault of their own, Defendants were deprived not only of the monetary compensation they were forced to pay Plaintiffs, but they were also burdened by the quasi-criminal sanction of punitive damages and deprived of the opportunity to clear their good names, all in violation their Fifth Amendment right to procedural due process.

The action of the district court in entering the judgment nil dicit and the action of the appellate court, in affirming its decision, were in direct contradiction to the usual course of judicial proceeding and precedent. The great weight of case law on the issue of default judgments mandates that the entry of a judgment, absent a trial on the merits, is an extreme action that should be considered a

judicial remedy of last resort. Furthermore, the federal courts have consistently held that a default judgment should not be used to punish attorneys for their mistakes, particularly when their clients are blameless. Despite this precedent, the trial court entered the default judgment, and the appellate court ratified its action. Nevertheless, Defendants maintain that an injustice has been done to them, in violation of their constitutional rights, and thus they now seek relief from this Court.

B. This Case Presents Important Issues Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

By virtue of the Fifth Amendment, the United States Constitution guarantees that individuals will not be deprived of life, liberty, or property without due process of law. This right has been held to extend to those parties embroiled in civil litigation; civil litigants "have a due process right to fully and fairly litigate each issue in their case." *duPont v. Southern National Bank of Houston*, 771 F.2d 874, 880 (5th Cir. 1985). Furthermore, the federal courts have cautioned against the use of judicial power in violation of constitutional rights, as "[t]he need for orderly administration of justice does not permit violations of due process." *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987). Indeed, as at this Court understood, even before the turn of the century, judicial power should never be used to deprive a litigant of the right to have his case adjudicated on its merits:

> To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an

> instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Hovey v. Elliot, 167 U.S. 409, 414, 17 S.Ct. 841, 843 (1897).

This reluctance to enter a default judgment in light of the necessity of preserving procedural due process is especially warranted where a litigant faces the possibility of the imposition of punitive damages. As the Texas Supreme Court has pointed out, "[p]unitive...damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct." *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994). *See also, Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 47, 111 S.Ct. 1032, 1058-59 (1991) (O'Connor, J., dissenting). Thus, because punitive damages operate much like criminal sanctions, they are deserving of special procedural protection: "The legal justification for punitive damages is similar to that for criminal punishment, and like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment." *Id.* at 16-17. In this case, however, Defendants were completely prevented from putting on any type of evidence in their own defense. By virtue of a default judgment, for which they were not responsible, all issues of liability were automatically resolved against Defendants, leaving them with no means to fight the quasi-criminal sanction of punitive damages.

"A fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965), quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914).

However, through no fault of their own, Defendants were stripped of their constitutionally protected right to litigate those claims made against them. Under the auspices of the common law doctrine of judgment nil dicit, now incorporated into Federal Rule of Civil Procedure 55(a), *Giampaoli v. Califano*, 628 F.2d 1190, 1193 (9th Cir. 1980), the district court rendered Defendants in default and refused them their opportunity to be heard, despite full participation in discovery and other pre-trial proceedings. By affirming that decision, the Fifth Circuit compounded the district court's unconstitutional act.

The Supreme Court has yet to speak on the issue of whether a district court may constitutionally render a party in default where that party has done nothing of its own accord to warrant such an action. Therefore, given the grave result in this case and the importance of the constitutional and procedural doctrines involved, this Court should consider this issue in order to do justice for these Defendants and to prevent other litigants from suffering a similar deprivation of their rights.

C. The Fifth Circuit's Affirmance In This Case Effectively Leaves In Place A Judgment Which Conflicts With Other Cases Of Similar Facts.

By entering what basically amounted to a default judgment against Defendants, the district court acted in a manner contrary to the usual course of judicial proceeding and precedent. The federal judiciary has consistently held that default judgments are to be used sparingly, as a means of last resort, in consideration of the strong policies favoring the resolution of disputes on their merits. *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir.

1980); *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969).

The reluctance to enter a default judgment against a litigant is particularly great when the party has demonstrated a desire to defend the suit. *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989). Thus, default judgments should only be entered when the adversary process has been halted because of an essentially unresponsive party. *Id.*; *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). In this case, Defendants actively participated in the defense of Plaintiffs' suit and were completely unaware that they were technically in default until a week before trial. By choosing to enter the default judgment against Defendants, the district court not only ignored their previously asserted meritorious defenses, but it ignored federal judicial precedent as well.

More importantly, the district court used the default judgment as a means of punishing defense counsel, despite the unfortunate effect of depriving the actual Defendants of the opportunity to defend themselves. This approach has been expressly disapproved by the federal courts: "A default judgment deprives the client of his day in court, and should not be used as a vehicle for disciplining attorneys." *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 195 (6th Cir. 1986); *Jackson* at 837.

Furthermore, where the failure to answer is the result of a minor procedural mistake of counsel, default is not an appropriate remedy, and courts should not fail to distinguish between the fault of the attorney and the blamelessness of the client. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988).

Rather, "courts should be 'reluctant to attribute to the parties the errors of their legal representatives.'" *A.F. Dorfmeyer Co., Inc. v. M.J. Sales & Distributing Co., Inc.*, 461 F.2d 40, 43 (7th Cir.1972), quoting *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954). "[J]ustice demands that a blameless party not be disadvantaged by the errors or neglect of his attorney which cause a final, involuntary termination of proceedings." *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987).

In this case, Defendants had absolutely nothing to do with the circumstances surrounding the district court's decision to enter a default judgment. Unfortunately, in order to punish their counsel, the court deprived Defendants of their ability to defend themselves, in spite of the wide range of less drastic remedies the court could have employed in order to redress the error of their attorneys. *See, e.g., Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990). This result, however, deprived Defendants of their constitutional right to due process, in direct contradiction to judicial proceeding and precedent.

CONCLUSION AND PRAYER

For the foregoing reasons, Petitioners respectfully pray that this Court grant writ of certiorari.

Respectfully submitted,

J. PRESTON WROTENBERY*
WILLIAM S. HELFAND
MARLA A. MOORE
HIRSCH, ROBINSON, SHEINESS
& GLOVER, P.C.
3600 One Houston Center
1221 McKinney
Houston, Texas 77010
Telephone: (713) 609-7981
Facsimile: (713) 609-7600

* *Counsel of Record*

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20925
No. 95-20168
Summary Calendar

JED BLUDWORTH and JONELL BURNETT,
Plaintiffs-Appellees,

VERSUS

BUBBA HOKE, BARRY GRESHAM, and
WALKER COUNTY, TEXAS
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

(CA-H-93-398)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Donald Hoke, Barry Gresham, and Walker County ("defendants") appeal a default judgment, two evidentiary rulings, and an award of attorney's fees. We affirm as to the default judgment and evidentiary rulings and remand for reconsideration of the amount of attorney's fees.

Jed Bludworth and Jonell Burnett ("plaintiffs") brought this § 1983 action against Walker County and two of its sheriff's deputies, Hoke and Gresham ("deputies"), alleging that the deputies forced their way into Burnett's house, brutally assaulted Bludworth, and arrested and imprisoned Bludworth without cause. Defendants filed a timely motion to dismiss for failure to state a claim, which the district court denied, and the parties engaged in substantial discovery during the following twelve months. Defendants later filed an answer, one week before the scheduled start of trial and eleven months after it was due. They also filed a portion of a proposed pretrial order the following day. Plaintiffs moved to strike the untimely answer, and the court issued a "judgment nil dicit," striking the answer and accepting the allegations of the complaint as true.

After a trial on damages, a jury awarded Bludworth and Burnett $10,000 each for mental anguish and $50,000 each in punitive damages. The court then awarded them $37,800 in attorney's fees.

II.

A.

Defendants argue that the district court erred in granting "judgment nil dicit." The district court entered the judgment because defendants first failed to file a timely answer and then filed an untimely one in bad faith. As defendants answered eleven months late, and the court had reminded them on several occasions of the need to file an

answer, the court found that their delay in answering was willful. The court also found that the late answer was an improper general denial, as it failed to admit many facts that were not reasonably in issue. Because defendants had completed sixteen months of discovery before making the general denials on the eve of the trial, the district court concluded that they did not answer in good faith.

Defendants contend that they avoided default by (1) presenting meritorious defenses in their motion to dismiss, motion for summary judgment, and proposed pretrial order; (2) showing good cause for their failure to answer timely; (3) actively defending the suit; and (4) causing no prejudice to plaintiffs. They also argue that default judgment is improper when defense attorneys, rather than defendants themselves, cause the default.

Plaintiffs respond that the district court's finding that defendants willfully failed to answer is not clear error. Plaintiffs also argue that defendants have never presented meritorious defenses, as the late answer is an invalid general denial, and the proposed pretrial order was never entered. In their reply, defendants concede that reversal is not mandatory; rather, they ask us to exercise our supposed discretion to reverse the district court's exercise of its discretion.

B.

We interpret the "judgment nil dicit" as an entry of default judgment pursuant to FED. R. CIV. 55(b)(2), which permits a district court to enter a judgment of default against a party who has appeared in an action but failed to plead. We review a district court's judgment of default for abuse of discretion and its subsidiary findings of fact for clear error. *CJC Holdings v. Wright & Lato*, 979 F.2d 60, 63-64 (5th

Cir. 1992). Because we favor adjudicating cases on their merits, "even a slight abuse [of discretion] may justify reversal." *Id.* at 63 n.1 (quoting *Williams v. New Orleans Pub. Serv.*, 728 F.2d 730, 734 (5th Cir. 1984)); *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992).

We must determine whether there is "good cause" to set aside the default. We may consider a variety of factors, including "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *CJC Holdings*, 979 F.2d at 64. If a defendant's failure to plead does not result from excusable neglect, it is within the district court's discretion to enter default judgment without considering other factors. *Id.*; *Dierschke*, 975 F.2d at 184.

C.

The district court found that defendants willfully failed to file a timely answer, implicitly rejecting their claim of excusable neglect. The court found that the delay was willful because (1) it asked defendants several times to file an answer, and (2) defendants "have no explanation for the eleven-month delay." This finding is not clear error.

Defendants first contend that the district court reminded them only once, not several times, of the need to file an answer. Their only support for this contention is their attorney's affidavit. We accept the district court's version of what occurred.

Defendants next argue that the district court ignored conclusive proof that their neglect is excusable. The district court observed in its opinion on the "judgment nil dicit" that defendants had offered no explanation for their failure to file a timely answer. In their motion to set aside the judgment,

defendants claimed that they had prepared an answer months earlier but forgot to file it. The district court denied the motion, implicitly rejecting this excuse.

The district court's disbelief is not clear error. First, defendants failed at least twice——once after the motion to dismiss was denied and once after the conceded warning——to file their answer. Second, the answer they did eventually file violated FED. R. CIV. P. 8(b), which prohibits general denials. Defendants admit as much, arguing that pretrial order superseded the pleadings and relieved them of the need to file an answer meeting the minimal requirements of the Federal Rules of Civil Procedure. Third, defendants took a contrary position in the district court, arguing implausibly in their motion to set aside the judgment that they had "admitted to all material factual assertions which they c[ould]" in their answer. Finally, defendants' "conclusive[]" proof consists only of their own attorneys' self-serving affidavits and computer records. Defense counsel overestimate their credibility.

Finally, defendants' active defense of this case is irrelevant. Rule 55 permits judgment by default when a party "has failed to plead *or* otherwise defend." FED. R. CIV. P. 55(a) (emphasis added). Default judgment is proper on *either* basis. *See generally* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 55.03[1] (2d ed. 1991). "[O]therwise defend[ing]" does not save defendants from their failure to plead.

Defendants' failure to file a timely answer did not result from excusable neglect. Thus, the judgment of default is not an abuse of discretion.

III.

The deputies contend that the district court erred by (1) excluding their testimony as to their states of mind and (2) ruling that if the deputies testified about their net worth, it would permit plaintiffs to introduce evidence of the deputies' liability insurance. We review a district court's evidentiary rulings for clear error. *Williams v. Briggs Co.*, 62 F.3d 703, 707 (5th Cir. 1995).

A.

The deputies contend that evidence of their states of mind is relevant to the determination of punitive damages. Under Texas law, and award of punitives depends in part upon "the degree of culpability of the wrongdoer." *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

Accepting the allegations of the complaint as true, the district court read a statement to the jury describing a brutal and unprovoked assault during which the deputies slammed Bludworth into a kitchen counter, dragged him into another room by his hair, shoved his face into a sofa cushion, and responded to Burnett's pleas to let her son up and stop suffocating him by lifting Bludworth up and then kneeing him in the groin and hitting him several times in the stomach. The district court did not abuse its discretion by finding that the intent behind the deputies' actions spoke for itself.

B.

The deputies next contend that they were entitled to testify about their net worth, because a defendant's ability to pay is relevant to the award of punitive damages. The district court agreed, ruling that (1) the deputies could inject

their ability to pay into the case, and (2) if they did so, plaintiffs could also present evidence of the deputies' ability to pay, including their liability insurance.

The deputies argue only that the latter ruling violated FED. R. EVID. 411.[1] Rule 411 excludes evidence of liability insurance only as proof of fault; it does not speak to damages. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURES § 5364 (1980). This argument is meritless.

IV.

Defendants claim that the district court's award of $37,800 in attorney's fees is excessive, because (1) plaintiffs' attorneys failed to keep sufficiently detailed records, (2) plaintiffs obtained only limited success at trial, and (3) the lead attorney's claimed billing rate is exorbitant. We review the district court's award of attorney's fees for abuse of discretion and findings of fact supporting the award for clear error. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir.), *cert. denied*, 114 S.Ct. 548 (1993). The district court awarded plaintiffs $36,400 for 113 hours worked by their lead counsel, at the rate of $325 per hour, and $1,400 for 22 hours of work by another attorney with a lower billing rate.

---

[1] The rule states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongly. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose*, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411 (emphasis added).

A.

Defendants' first two contentions are meritless. First, we have reviewed the time records and found them to be "sufficiently detailed to allow the [district] court to make an independent evaluation of whether the hours claimed are justified." *In re Lawler*, 807 F.2d 1207, 1212 (5th Cir. 1987).

Second, $37,800 is not excessive in light of "the significance of the overall relief obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Bludworth and Burnett each received $10,000 for emotional harm and $50,000 in punitive damages. If the deputies truly believe that the award of $100,000 in punitives is a poor result for plaintiffs, the jury should have awarded more.

B.

Defendants are correct that $325 is a high hourly rate in the Houston market. Plaintiffs prepared a memorandum on fees awarded in other cases in Houston, however, showing that awards of up to $300 have not been uncommon. Defendants countered with evidence of only (1) the rate awarded in one old case and (2) their own billing rate of $100 per hour. Plaintiffs observe:

> While [defense] counsel's hourly rate is undoubtedly justified, given his manifest command and mastery of the Federal Rules of Civil Procedure . . . the rate charged by [defense counsel], who presented no controverting evidence or affidavits to establish the reasonableness of plaintiffs' attorney's fees[,] fails to present any meaningful challenge to the district court's award.

Plaintiffs are correct that based upon the lopsided record before the district court, its finding that $325 is a reasonable hourly rate is not, by itself, clear error.

C.

A district court may not base its fee award only upon awards in other cases, however; instead, it must consider the twelve *Johnson* factors in determining the amount of a reasonable fee. *Cobb v. Miller*, 818 F.2d 1227, 1231 (5th Cir. 1987). These factors include the skill necessary to litigate the case, the time and labor required, the difficulty of the questions presented, time limitations, and counsel's experience. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). While we need not remand solely because a district court fails to make solid findings on each of the twelve *Johnson* factors, we must remand when the record does not clearly indicate that the district court considered those factors. *Cobb*, 818 F.2d at 1232.

The district court did not write an opinion on its fee award. Instead, the court's conclusions appear in an excerpt of a hearing transcript, in which the court made only two relevant findings: (1) that plaintiffs are entitled to fees for all of the hours claimed and (2) that "for a [p]laintiff's civil rights lawyer operating in South Texas under the practical and legal constraints . . . $325 an hour is a reasonable rate for reasonably necessary time spent."

While the district court's reasoning appears sound, it is also incomplete. Under *Johnson*, a district court must make an individualized fee determination. Obviously, a court would abuse its discretion by awarding the same amount in every case; similarly, a determination based solely upon rates awarded in other cases, without consideration of

whether those cases are comparable in light of the *Johnson* factors, would warrant reversal.

We may affirm only after reviewing a record that demonstrates that the court's discretion was guided by proper factual and legal criteria. *Blanchard v. Bergeron*, 893 F.2d 87, 89 (5th Cir. 1990). This appears to have been a straightforward case for plaintiffs, especially in light of the shortcomings of defense counsel, and $325 per hour is at the high end of the range of reasonable hourly rates. The district court should have explained its award in light of the relevant *Johnson* factors.

We AFFIRM the "judgment nil dicit" and evidentiary rulings and REMAND for reconsideration of the reasonable amount of attorney's fees.

APPENDIX B

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
JED BLUDWORTH, *et al.*, Plaintiffs,	§	
versus	§	CIVIL
	§	ACTION:
BUBBA HOKE, *et al.*, Defendants.	§	H-93-398

INTERLOCUTORY JUDGMENT NIL DICIT

1. The defendants' answer is struck.

2. A judgment is rendered holding them liable.

3. A trial on damages will be set soon.

Signed July 12th, 1994, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT — **SOUTHERN DISTRICT OF TEXAS**

JED BLUDWORTH, *et al.*, Plaintiffs,	§	
versus	§	CIVIL ACTION:
BUBBA HOKE, *et al.*, Defendants.	§	H-93-398

OPINION ON JUDGMENT NIL DICIT

1. *Introduction*

Jed Bludworth and Jonell Burnett ask the court to strike the answer of Bubba Hoke, Barry Gresham, and Walker County and to render a judgment on liability. When the defendants answered over eleven months late, it was in the form of a general denial. The defendants' answer will be struck and a judgment nil dicit rendered against them.

2. *Background*

On February 10, 1993, Bludworth and his mother, Burnett, filed a complaint alleging that Bubba Hoke and Barry Gresham, deputies of the Walker County Sheriff, violated their civil rights through the two deputies' entering

the mother's house without a warrant, beating Bludworth, and arresting him without probable cause.

The defendants appeared on March 9, 1993, to request an extension of time to respond. The extension was granted, and on March 22 the defendants moved to dismiss the case for failure to state a claim. It was denied on May 24, making the answer date June 7.

The defendants answered one year later, on May 17, 1994. Their answer was essentially a general denial of Bludworth's complaint. Bludworth now requests that the defendants' answer be struck because it was not filed within ten days of the denial of the motion to dismiss and because a general denial is an improper answer. FED. R. CIV. P. 12(a), 8(b). The defendants have never asked for more time to answer.

3. *Chronology*

February 10, 1993:	Bludworth and Burnett file their complaint.
March 9, 1993:	Defendants move to extend time to respond.
March 10, 1993:	Extension is granted through March 22.
March 22, 1993:	Defendants move to dismiss for failure to state a claim.
May 24, 1993:	Motion to dismiss is denied.
June 7, 1993:	Answer is due.

May 17, 1994:	Defendants answer with a general denial.
May 19, 1994:	Bludworth moves to strike the answer.
June 9, 1994:	Defendants respond to the motion to strike.

4. *Late Answer.*

Because the defendants moved to dismiss before the original answer deadline and because the motion was denied on May 24, 1993, they had until June 7 to serve Jed Bludworth with their answer. FED. R. CIV. P. 12(a). Without explanation, the defendants answered only on May 17, 1994, eleven months late.

The defendants contend that their delay is a mere technicality. The law requires the failure to answer on time to have been a mistake or a minor lapse to be excusable. *Moriani v. Hunter*, 462 F.Supp. 353, 354-55 (S.D.N.Y. 1978) (answer three weeks late because of an identifiable mistake.) *United States ex rel. Houghton v. Scranton*, 257 F. Supp. 557, 558-59 (E.D. Pa. 1966) (answer less than one month late).

Because of the delay for the motion to dismiss, the defendants had three months after they were served to answer. Instead, their answer came over fifteen months after service. They knew how to request more time to answer, as they had done it once before. The defendants were also told several times in pre-trial conferences to answer. The facts compel the conclusion that the defendants' delay was willful. They have no explanation for the eleven-month delay. The

defendants' dilatory conduct serves only to complicate the judicial process.

5. *General Denial.*

When the defendants finally did see fit to answer Bludworth's complaint, they filed a qualified general denial. Although general denials are appropriate in limited circumstances, the defendants' use of a general denial here is manifestly improper, for there had been a hearing on a motion to dismiss and much discovery completed, allowing the defendants to know everything they needed to answer fully and precisely.

General denials are disfavored and are acceptable only if they are made in good faith. 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1265 (1990). *White v. Smith*, 91 F.R.D. 607, 608 (W.D.N.Y. 1981). The defendants claim, after 15 months into the lawsuit, they can admit only that (a) Walker County is within the Southern District of Texas; (b) Hoke and Gresham are deputies of the Walker County Sheriff, and (c) Hoke and Gresham responded to a call at Bludworth's residence at the time and date in the complaint. The answer denies jurisdiction and venue. It also denies that Bludworth, Burnett, Hoke, and Gresham are residents of Walker County. It is impossible to believe that the defendants, in good faith, deny all but a minute portion of Bludworth's 53 paragraph complaint. After all, they had 16 months of discovery to learn what they could admit or deny.

Since Bludworth moved to strike, the defendants have had more than a month to seek permission to amend their answer. They have not. Instead, in the defendants' response to Bludworth's motion to strike, they essentially reaffirm the general denial. One of the purposes of an answer is to

narrow the scope of a lawsuit. 5 WRIGHT AND MILLER, *supra* § 1202. By responding to Bludworth's complaint with a general denial, the defendants defeated this purpose, complicating this protracted litigation. Their answer is not made in good faith. The defendants have had three opportunities to raise a meritorious defense. They could have given some meaningful defense in their motion to dismiss, their answer, or their response to the motion to strike. They did not.

6. *Conclusion.*

Because the defendants have offered no explanation for their eleven-month delay in filing an answer and have raised no meritorious defense with their general denial, their answer will be struck. "[A] judgment by default is one taken against the defendant for failure to appear, being distinguished from a judgment nil dicit, which [is] the appropriate form of judgment where, after appearance, the defendant failed to plead within the proscribed time." 3 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1262 (5th ed. 1925). This court, therefore, will render a judgment nil dicit against the defendants on the question of their liability. The facts in the complaint are accepted as true, and a trial will be held to determine damages.

Signed July 12th, 1994, at Houston, Texas.

/s/

Lynn N. Hughes
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

JED BLUDWORTH, *et al.*, Plaintiffs,	§	
	§	CIVIL
versus	§	ACTION:
	§	H-93-398
BUBBA HOKE, *et al.*, Defendants.	§	

ORDER

The defendants' motion to set aside the judgment nil dicit is denied.

Signed August 8th, 1994, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT COURT OF TEXAS

JED BLUDWORTH, *et al.*, Plaintiffs,	§	
	§	CIVIL
versus	§	ACTION:
	§	H-93-398
BUBBA HOKE, *et al.*, Defendant.	§	

COURT'S INSTRUCTIONS AND SPECIAL INTERROGATORIES

You are instructed that you should assess the amount you find to be full, just, and reasonable compensation for all of Bludworth and Burnett's damages. Damages must not be based on speculation. Consider these elements of damage and no others. Consider each element of damage separately. Do not include interest.

A. *Pain*. Pain means physical suffering.

B. *Anguish*. Anguish means emotional pain, torment, and suffering.

Question One.

What sum of money if paid now in cash, would fairly and reasonably compensate Jonell Burnett for her anguish that resulted from the violation of her rights?

Answer in dollars, if any.

Answer: 10,000

Question Two.

What sum of money if paid now in cash, would fairly and reasonably compensate Jed Bludworth for his pain and anguish that resulted from the violation of his rights?

Answer in dollars, if any.

Answer: 10,000

You may also make an award of punitive damages against Hoke and Gresham, but not the County. Punitive damages are to punish a party for extreme or outrageous conduct or to deter others from acting unconstitutionally, including failing to act constitutionally.

If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may award them. The law does not require you to award punitive damages; however, if you decide to award them, you must use sound reason in setting the amount. Neither the award itself nor the amount of an award may reflect bias, prejudice, or sympathy. The amount can be as large or as small as you believe necessary to fulfill the purposes of punitive damages. You may impose punitive

damages against one of the defendants and not the other, or against both in different amounts, or against neither.

Question Three.

What amount, if any, should be awarded to Burnett as punitive damages?

Answer in dollars, if any.

Bubba Hoke: 25,000

Barry Gresham: 25,000

Question Four.

What amount, if any, should be awarded to Bludworth as punitive damages?

Answer in dollars, if any.

Bubba Hoke: 25,000

Barry Gresham: 25,000

/s/
Foreman of the Jury

9-21-94 /s/
Lynn N. Hughes
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

JED BLUDWORTH, *et al.*, Plaintiffs,	§	
	§	CIVIL
versus	§	ACTION:
	§	H-93-398
BUBBA HOKE, *et al.*, Defendants,	§	

AMENDED FINAL JUDGMENT

1. Jonell Burnet recovers $10,000 for mental anguish from Bubba Hoke, Barry Gresham, and Walker County, jointly and severally.

2. Jed Bludworth recovers $10,000 for mental anguish from Bubba Hoke, Barry Gresham, and Walker County, jointly and severally.

3. Burnett recovers $25,000 punitive damages from Bubba Hoke.

4. Burnett recovers $25,000 punitive damages from Barry Gresham.

5. Bludworth recovers $25,000 punitive damages from Bubba Hoke.

6. Bludworth recovers $25,000 punitive damages from Barry Gresham.

Signed March 9th, 1995, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

JED BLUDWORTH, *et al.*, Plaintiffs,	§	
	§	CIVIL
versus	§	ACTION:
	§	H-93-398
BUBBA HOKE, *et al.*, Defendants.	§	

ORDER ON ATTORNEYS' FEES

Jed Bludworth and Jonell Burnett recover from Bubba Hoke, Barry Gresham, and Walker County, jointly and severally:

A. $36,400 attorney's fees for Harry Walsh, III;

B. $1,400 attorney's fees for Gerald M. Birnberg; and

C. $120 costs.

Signed March 9th, 1995, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20925

JED BLUDWORTH; JONELL BURNETT
Plaintiffs - Appellees

v.

BUBBA HOKE; BARRY GRESHAM; WALKER COUNTY TEXAS
Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING
(December 20, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

(2)

No. 95-1540

Supreme Court, U.S.
FILED
APR 24 1996

In The

Supreme Court of the United States

October Term, 1995

BUBBA HOKE, BARRY GRESHAM and WALKER COUNTY, TEXAS,

Petitioners,

vs.

JED BLUDWORTH and JONELL BURNETT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GERALD M. BIRNBERG
Counsel of Record
MATT E. RUBIN
WILLIAMS, BIRNBERG
& ANDERSEN, L.L.P.
Attorneys for Respondents
6671 Southwest Freeway, #303
Houston, Texas 77074-2284
(713) 981-9595

ZIPT

QUESTION PRESENTED

Respondents, Jed Bludworth and Jonell Burnett, do not concur with petitioners' statement of "questions presented." The due process issue which petitioners now seek to present to this Court was never presented to the Court of Appeals in any fashion. In fact, the phrase "due process" never appears in any pleading or brief filed by petitioners in the court below. Accordingly, respondents urge that the following constitutes a more accurate articulation of the substantive question arguably properly presented by this Petition for Writ of Certiorari:

1. Whether a district court has discretion to strike an untimely answer and to render judgment by default where there has been a willful disobedience to a court's repeated instructions to file an answer, and where the pleading ultimately untimely filed is found by the district court to be a prohibited general denial not filed in good faith, violative of the requirements of FED. R. CIV. P. 8 and 11?

LIST OF INTERESTED PARTIES

The petitioners are Bubba Hoke, Barry Gresham, and Walker County, Texas. Petitioners' counsel of record are J. Preston Wrotenbery, William S. Helfand, and Marla A. Moore of Hirsch, Robinson, Sheiness & Glover, P.C., who also represented petitioners in the courts below.

The respondents are Jed Bludworth and Jonell Burnett. Respondents were represented at trial by the late Harry H. Walsh, III and by Gerald M. Birnberg of Williams, Birnberg & Andersen, L.L.P. Respondents' counsel of record in this Court are Gerald M. Birnberg and Matt E. Rubin of Williams, Birnberg & Andersen, L.L.P.

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In The Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1540

BUBBA HOKE, BARRY GRESHAM, and
WALKER COUNTY, TEXAS,
Petitioners,

v.

JED BLUDWORTH and JONELL BURNETT,
Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS JED BLUDWORTH AND JONELL BURNETT

Respondents request that the Court deny the petition for writ of certiorari seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit. Pursuant to Fifth Circuit local rule 47.5.1, the Court of Appeals' opinion was not published, but it appears at appendix "A" to the petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners now (for the first time in this case) attempt to assert a deprivation of procedural due process of law, in violation of the Fifth Amendment to the Constitution of the United States,

as their primary claim justifying review by this Court. Petitioners did not raise this issue at any point before the Court of Appeals, and it is not, therefore, not properly before the Court.

Even if the issue as presented were proper for resolution, however, respondents do not concur that the case involves any due process concerns because petitioners' answer was not stricken, and judgment was not rendered, "solely on the basis of a minor procedural mistake by a litigant's attorney," as petitioners claim. (Petition at 2, 5; See pp. 6, 7). Rather, the judgments of the courts below were predicated on Fed. R. Civ. P. 55, to which petitioners properly advert, and also upon the effect of Fed. R. Civ. P. 8(b), which prohibits general denials not filed in good faith. In relevant part, that rule provides as follows:

> **(b) Defenses; Form of Denials . . .**
>
> Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

RESPONDENTS' STATEMENT OF THE CASE

In their statement of the case and reasons for allowance of the writ, petitioners assert that both the district court's striking of petitioners' answer and rendering of an interlocutory judgment by default (or "nil dicit") on liability, and the Court of Appeals' affirmance of those discretionary decisions, were predicated "solely on the basis of a minor procedural mistake committed by their counsel." (Petition at 5). Neither of the judgments in the courts below may fairly be read to have been predicated on this ground.

What the record actually reveals is that the district court determined to strike petitioners' untimely answer after being "compelled" to the conclusion "that their unexplained delay was willful and dilatory conduct serving only to complicate the judicial process." (App. C: 14a-15a). Contrary to the portrayal of events in the petition, the district court actually found that the failure to answer was not due to some "minor" oversight, but rather to deliberate and conscious decision of the petitioners designed intentionally to frustrate the judicial process. Moreover, the "answer" ultimately filed (more than eleven months late and after repeated instructions from the court for petitioners to file one earlier) (*Id.*: 14a), amounted to nothing more than a prohibited general denial "not made in good faith", according to the district court. (*Id.*: 15a-16a). The Court of Appeals affirmed this ruling, finding neither clear error nor an abuse of discretion in these express determinations (App. A: 4a-5a).

Pursuant to United States Supreme Court Rule 15.2, therefore, respondents are constrained to bring these misstatements of fact and law to the Court's attention, and to submit their alternative statement of the case.

Course of Proceedings and Disposition of the Case Below

This civil action was filed on February 10, 1993 by plaintiffs/respondents, Jed Bludworth and his mother, Jonell Burnett, complaining of an unprovoked and brutal assault by Walker County sheriff's deputies, petitioners/defendants Donald Hoke and Barry Gresham (the "deputies"), allegedly committed pursuant to an official custom or policy of Walker County, Texas (the "county"). (R. 1:9)[1]. Plaintiffs alleged claims under 42 U.S.C. § 1983 for violation of rights secured to them by the Fourth and Fourteenth Amendments to the Constitution of the United States.

On March 9, 1993, the deputies and the county filed an unopposed motion for extension of time to file responsive pleadings, (R. 3:13), which was granted, allowing them until March 22, 1993, "to file responsive pleadings to Plaintiffs' Original Complaint." (R. 3:14). On that date, the petitioners filed a motion to dismiss, asserting, among other grounds, that acts of unprovoked assault and verbal and physical abuse do not violate clearly established law. (R. 3:24). The motion was denied on May 24, 1993. (R. 3:37).

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[1] The record on appeal comprises three volumes. References to the record volume shall be indicated as "R. ___". Page references shall be indicated by a colon after the reference to the record volume as "R. ___:___". The transcript of proceedings comprises volumes 4-6 of the record. References to pages within the transcript shall be made according to the internal pagination of the transcript as filed. References to any materials in the appendix to the Petition shall be indicated as "App. ____". Page references shall be indicated by a colon after the reference to the appendix as "App. ____: ___".

As a result of the overruling of their Rule 12(b)(6) motion to dismiss, the petitioners' answer was due to be filed by June 7, 1993. FED. R. CIV. P. 12(a)(4)(A). The deputies and the county neither filed an answer, nor requested a further extension on or before that date.

Thereafter, at various pre-trial conferences, the district court repeatedly directed the respondents to file an answer. (App. C: 14a). By April 11, 1994 — more than ten months later — they still had not done so.

On April 11, 1994, the district court entered an order setting the case for trial on May 24, 1994. (R. 3:50). Not until May 17, 1994 did petitioners file their "original answer and jury demand." (R. 3:103). This document merely generally denied "each and every one of the factual allegations" contained in plaintiffs' eight page, 52 paragraph original "petition" (R. 3:9-1), except for three inconsequential matters, which were admitted[2].

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[2] The answer admitted that Walker County is located in the Southern District of Texas, that the individual defendants were Walker County sheriff's deputies, and that the deputies responded to a call at the plaintiffs' residence on the date and time alleged. (R. 3:103-02, ¶ 3, 4). The answer denied, among other incontrovertible facts, the assertions that venue was proper in the Southern District of Texas; that the United States district court possessed jurisdiction to decide a § 1983 case; the citizenship and residency of the parties; the fact that the original call was made to Huntsville Memorial Hospital; the deputies' handcuffing of plaintiff Bludworth; the use of force in subduing Bludworth and placing him in the patrol car; that upon arrival at the Walker County Jail, Bludworth was handcuffed and shackled and placed in a padded cell; and that the only sanitary facility in that cell was a hole in the floor.

On May 19, plaintiffs moved to strike petitioners' original answer for its failure to comply with Rule 8(b). (R. 3:123). In their supplemental motion to strike the answer, plaintiffs requested that a default judgment be entered. (R. 3:125). Upon receiving those pleadings, the court continued the May 24 trial setting and on July 12, 1994, it struck the petitioners' answer, rendered an interlocutory judgment "nil dicit" (App. B) against them with regard to liability, and ordered a trial on damages. A supporting opinion was issued, (App. C), in which the district court observed,

> [t]he defendants were also told several times in pre-trial conferences to answer. The facts compel the conclusion that the defendants' delay was willful. They have no explanation for the eleven-month delay. The defendants' dilatory conduct serves only to complicate the judicial process.

(App. C: 14a).[3] The district court further grounded its order on petitioners' abuse of Rule 8(b), stating

> [w]hen the defendants finally did see fit to answer Bludworth's complaint, they filed a qualified general denial. Although general denials are appropriate in limited circumstances, the defendants' use of a general denial here is manifestly improper, for there had been a hearing on a motion to dismiss and much discovery completed, allowing the defendants to know

---

[3] Petitioners claimed in the court below that this finding was erroneous, but the Court of Appeals failed to uphold this argument and the "question presented" to this Court does not complain of the sufficiency of the evidentiary basis for this factual determination.

> everything they needed to answer fully and precisely . . . It is impossible to believe that the defendants, in good faith, deny all but a minute portion of Bludworth's 53 paragraph complaint. After all, they had sixteen months of discovery to learn what they could admit or deny.

(App. C: 15a).

At this point, petitioners moved to set aside the judgment nil dicit and belatedly — more than two months after the deficiencies in their "answer" had been expressly brought to their attention by respondents' motion to strike, and almost two weeks after entry of the judgment — finally sought leave to file an amended answer (R. 2:207), a proposed amended answer (R. 2:214), and an amended motion to set aside the judgment (R. 2:228). The motion to set aside was denied, (R. 2:241, 275), the case proceeded to trial, and a jury assessed damages in the amounts set forth in petitioners' statement. By separate order, the court awarded attorney's fees pursuant to 42 U.S.C. § 1988.

An appeal to the Fifth Circuit ensued. In an unpublished opinion, the Court of Appeals concluded that the district court had not abused its discretion either in striking petitioners' answer, in rendering judgment on liability, or in concluding that petitioners' failure to answer in a timely or proper fashion had been willful. (App. A: 4a-5a).

REASONS FOR DENYING THE WRIT

I. Petitioners Failed to Present their Constitutional Arguments to the Courts Below

Petitioners' primary argument is that they have been deprived of procedural due process of law, in violation of the Fifth Amendment to the Constitution of the United States, by

virtue of having judgment entered against them "nil dicit" as a result of what they inaccurately describe as a simple "mistake" by their lawyer. Petitioners' constitutional argument makes its first appearance in this Court: in neither their briefs below nor in their motion for rehearing in the Court of Appeals is there any such claim so much as adverted to, nor a single allusion to a deprivation of due process of law as a basis for appellate reversal. Petitioners simply and totally failed to present this constitutional claim to the Court of Appeals (or, for that matter, to the district court). This deficiency is, in and of itself, sufficient reason for denying the writ.

"[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"). This Court's established practice is to refrain from addressing issues not presented to the Court of Appeals. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). *See generally* R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 6.26 (7TH ED. 1993). The petitioners' failure to raise an issue at any point in the Court of Appeals, when brought to this Court's attention by a respondent's brief in opposition, precludes that issue from being reached or resolved by this Court. *E.E.O.C.*, 476 U.S. at 24. There is, accordingly, no reason to grant the writ since petitioners' due process claims, having never been presented to the Court of Appeals, are not properly before this Court for decision.

II. The Factual Underpinning of the Judgments Below Are Inappropriate for this Court's Further Review

Although petitioners have belatedly attempted to clothe this case with constitutional trappings, the only question actually presented is whether the district court acted within its discretion in finding that petitioners had willfully obstructed the judicial process by disobeying the court's repeated directions and the applicable rules of civil procedure, where the Court of Appeals found neither abuse of discretion nor clear error in the trial court's factual determinations in this regard. Petitioners effectively seek from this Court yet another review of the factual sufficiency of the trial court's findings, which were reviewed and upheld by the Court of Appeals.

The factual review sought by petitioners is not an appropriate exercise for this Court. Findings of a trial court which are affirmed on appeal do not merit reconsideration and attention by this Court:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 336 U.S. 271, 275, *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, rev'd in part*, 339 U.S. 605 (1950). This Court properly accords great weight to the fact-findings made by a district court and approved by a Court of Appeals. *N.C.A.A. v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984). Thus, Supreme Court review is unwarranted.

Moreover, it is highly unlikely that other litigants or their counsel would repeat the disobedience of a court's explicit

instructions to answer, or the express limitations of Rule 8(b) restricting the use of general denials, to the extent found by the courts below to have justified the district court's judgment in this case. Re-examination of the factual inquiry into the events leading to this result simply would not be an appropriate utilization of this Court's limited resources.

III. There Are No Unsettled Issues of Federal Law Properly Raised By This Case

A. Counsel's willfulness, bad faith, and delay is attributable to petitioners

Petitioners assert that this Court has never addressed the issue of whether a district court may constitutionally render a default against a party as a result of his or her attorney's failure to file a timely and proper answer. In truth, this Court has repeatedly held that a party's case can be dispositively affected — even to the client's extreme prejudice — by a lawyer's actions, inactions, or other decisions or derelictions in the course of litigation. Just three terms ago, for example, the Court expressly re-affirmed the long-established principle that "clients must be held accountable for the acts and omissions of their attorneys," even if the consequence of that conduct is dismissal of a lawsuit. *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380 (1993).

Indeed, this Court has never wavered from its insistence that litigants "be held accountable for the acts and omissions of their chosen counsel." *Id.* The most extreme example of this imputation involves death penalty cases, where the Court has repeatedly held that trial counsel's decisions are binding on a client even if they cost him his life, *see, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984). The same outcome obtains even if a crucial, case-determinative default was the result of pure inadvertence of counsel. *Murray v. Carrier*, 477 U.S. 478 (1986).

Coleman is particularly instructive here. In that case, the Court found no constitutional violation where petitioner was denied substantive review of serious federal constitutional claims because of the "inadvertent error," 501 U.S., at 749, of his lawyer in being three days late in filing a notice of appeal (even in a death penalty case). Surely, if due process is not offended by a death sentence where the court refuses to consider significant constitutional claims solely because of counsel's inadvertent three-day lapse in filing a procedurally required pleading, it cannot be affronted by a nil dicit judgment in a civil case where there has been an eleven month delinquency despite repeated warnings.

B. This Court has already determined this issue

More directly, and contrary to petitioners' assertion that this Court has never addressed this issue, the very argument presented here (to the effect that it is legally unsustainable to visit adverse consequences on a litigant on account of the errors of its lawyer) was decisively rejected by this Court more than 30 years ago. In *Link v. Wabash R. Co.*, 370 U.S. 626, 633 (1962), this Court ruled,

> [t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . .

In other contexts, devastating consequences to the litigants have regularly been upheld when counsel's errors have transgressed procedural mandates. For example, if counsel files a petition for certiorari out of time, the Court attributes that untimeliness to the petitioner and will deny the petition without requesting an explanation from the petitioner before acting. *Link*, 370 U.S. at 634 n.10. *See also, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 133 (1992) (upholding Rule 11 sanctions against party because "plaintiff's counsel 'create[d] a blur of absolute confusion'" and because of counsel's "careless pleading"); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (upholding dismissal of lawsuit on account of "counsel's 'callous disregard' of their responsibilities"). *See generally, Link v. Wabash R. Co.*, 370 U.S. at 634 n.10.

"[There is n]o procedural principle that is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). Where a right to contest allegations in a complaint is lost as a result of counsel's failure timely to comply with the procedural rules established for joining (and limiting) issue, no novel or constitutional principles are implicated. Rather, petitioners' remedy, if they have one, lies not with this Court in these circumstances, but, as *Link* observes and teaches, "against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

At all events, this Court has addressed the very claims petitioners assert here — as long ago as *Link v. Wabash* (1962) and as recently as *Pioneer v. Brunswick* (1993) and there is simply no compelling reason to re-visit such clearly and established law.

IV. The Fifth Circuit Judgment Is Correct and No Further Review of That Decision by This Court is Warranted

The Fifth Circuit Court of Appeals reviewed the district court's judgment of default for abuse of discretion and its subsidiary findings of fact for clear error. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63-64 (5th Cir. 1992). An intentional or willful failure to answer alone constitutes sufficient cause to uphold the default judgment. *Matter of Dierschke*, 975 F.2d 181, 184-85 (5th Cir. 1992). Based upon the petitioners' unexcused delay in filing their answer, conjoined with petitioners' violation of Rule 8(b), the Court of Appeals determined both that the district court's findings were not clear error, and that the court had not abused its discretion in entering the judgment of default. (App. A: 4a-5a).

Litigants are not free to test the limits of the trial court's patience, to disregard repeated warnings, and to flout the applicable rules of civil procedure with impunity. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 641-42. Flagrant bad faith and counsel's callous disregard of their responsibilities will justify the most extreme action. *Id.* at 643. Under the circumstances of this case, the Court of Appeals was correct in concluding that the district court had not abused his discretion.

V. There Is No Conflict of Decisions Among the Circuits

Petitioners finally argue that the Fifth Circuit's affirmance of the district court's judgment "conflicts with other cases of similar facts." (Petition at 9). The direct answer to this argument is that the claimed conflict simply does not exist. On the contrary, in none of the cases cited by petitioners were the Courts of Appeals presented with specific findings of disobedience of court orders, willful delay, and bad faith filings of general denials, approaching those with which the Fifth

Circuit was confronted in this case and which form the basis of the district court's judgment.

The question is not, of course, whether this Court, or even the Court of Appeals, would as an original matter have taken the same action, but rather, whether the district court abused its discretion in so doing. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. No Court of Appeals has ever adopted the rule urged by petitioners that the derelictions of counsel and failure to comply with the Federal Rules of Civil Procedure cannot result in entry of a judgment nil dicit, consistently with the Constitution's requirements of procedural due process. And, of course, no inter-circuit conflict over constitutional interpretation is implicated here because, among other reasons, the Fifth Circuit was never asked to address, and never purported to decide, any constitutional question in this case. Moreover, the decisions upon which petitioners rely simply did not involve an exercise of discretion in circumstances even remotely comparable to those presented by the record in the present case. Therefore, there is no conflict — let alone one deserving attention by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GERALD M. BIRNBERG
Counsel of Record
MATT E. RUBIN
6671 S.W. Frwy. # 303
Houston, Texas 77074
(713) 981-9595

Counsel for Respondents

OF COUNSEL:

WILLIAMS, BIRNBERG
& ANDERSEN, L.L.P.

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